SPRECHER, *Circuit Judge*. The history of these cases confirms the wisdom of *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313 (1971) and why the doctrine it announced is particularly applicable here.

Between 1958 and 1963, Technograph Printed Circuits, Ltd., and Technograph Printed Electronics, Inc. instituted some 74 civil actions for patent infringement against approximately 80 manufacturers of electronic equipment in 18 different United States District Courts, and another action against the United States in the Court of Claims.[1] Prior to the litigation, the president of Printed Electronics, an American company, wrote to Printed Circuits, a British company:

> "The Technograph patents are inherently weak and at heart only form the legal basis for making a claim against industry. Their real worth in America depends entirely how strongly they can be backed by both money, legal talent and influence.
>
> ". . . We must litigate if we expect to extract worthwhile sums from industry."
>
> • • •

The infringement actions were based upon three United States patents relating to methods for the manufacture of printed electric or magnetic circuits[2] — No. 2,441,960 ('960) issued on May 25, 1948, No. 2,706,697 ('697) issued on April 15, 1955, and Reissue No. 24,165 ('165) issued on June 12, 1956.

The first trial took place in the District of Maryland in an action against The Bendix Corporation (*Bendix*) where, after 29 trial days, the filing of 1001 exhibits, several additional days spent by the court in visiting the Bendix and plaintiffs licensed plants, 600 pages of post-trial briefs and two days of oral argument, Judge

[1] *Technograph Printed Circuits, Ltd.* v. *Methode Electronics, Inc.*, 285 F. Supp. 714, 716 (N.D. Ill. 1968) (detailing the history of the Technograph litigation).

[2] The manufacturing processes are fully described in *Technograph Printed Circuits, Ltd.* v. *Bendix Aviation Corp.*, 218 F. Supp. 1 (D. Md. 1963).

Watkins on May 27, 1963 held in a 67-page opinion that the claims at issue in all three patents were invalid. The Court of Appeals for the Fourth Circuit affirmed and certiorari was denied by the Supreme Court. *Technograph Printed Circuits, Ltd.* v. *Bendix Aviation Corp.*, 218 F. Supp. 1 (D. Md. 1963), *aff'd per curiam*, 327 F.2d 497 (4th Cir. 1964), *cert. denied*, 379 U.S. 826 (1964).

The plaintiffs represented in other courts that the Maryland case was the "test case."[1] After the test case, the British company transferred its rights in the patents to the American Company.

The plaintiffs had filed six infringement actions in the Northern District of Illinois in 1962 and 1963. Two were settled and Judge Igoe granted summary judgment in favor of the remaining four defendants after Judge Watkins' decision on the theory that "one bite of the cherry ought to be enough." We reversed and remanded for further proceedings on the authority of *Aghnides* v. *Holden*, 226 F.2d 949, 950 (7th Cir. 1955), where we cited *Triplett* v. *Lowell*, 297 U.S. 638, 642 (1936) for the proposition that "[n]either reason nor authority supports the contention that an adjudication adverse to any or all the claims of a patent precludes another suit upon the same claims against a different defendant." *Technograph Printed Circuits, Ltd.* v. *Methode Electronics, Inc.*, 356 F.2d 442, 448 n.3 (7th Cir. 1966), *cert. denied*, 384 U.S. 950, 1002 (1966). Upon remand the four cases were consolidated for purposes of discovery and trial, were declared to be class actions so far as the defendants were concerned (*Technograph Printed Circuits, Ltd.* v. *Methode Electronics, Inc.*, 285 F. Supp. 714 (N.D. Ill. 1968)), and the plaintiffs' claims relating to Nos. '960 and '165 were dismissed with prejudice on April 24, 1968, with no appeal being taken therefrom.

In the meantime, all of the files, records, exhibits and transcripts from the *Bendix* case in Maryland had been sent to the United States District Court for the Central

[1] *Technograph Printed Circuits, Ltd.* v. *Packard Bell Electronics Corp.*, 290 F. Supp. 308, 312 (C.D. Cal. 1968). See also, *Technograph Printed Circuits, Ltd.* v. *Martin-Marietta Corp.*, 474 F. 798, 804 (4th Cir. 1973).

District of California, where 13 actions by the Technograph plaintiffs had been consolidated. The defendants in California moved for summary judgment on the ground of estoppel by the Maryland judgment. While the motions were pending, the court granted the defendants' motion to compel the plaintiffs to produce any evidence "above and beyond the evidence they presented" in the Maryland case.[4] The court on August 8, 1968 found that "the Response of plaintiffs . . . together with the unindexed box of documents . . . [filed with the Clerk] was a wilful, intentional, and conscious flouting and disobedience of the Orders of this Court . . . [which] warrant the severest condemnation," whereupon the 13 actions were dismissed with costs in favor of the defendants. *Technograph Printed Circuits, Ltd.* v. *Packard Bell Electronics Corp.*, 290 F. Supp. 308, 320 (C.D. Cal. 1968). There is no published record of an appeal from that judgment.

Meanwhile there also was activity in plaintiffs case in the United States Court of Claims. After the court denied two motions by the government for partial summary judgment,[5] trial was held before Commissioner Davis who found claims 4, 10, 13 and 14 of No. '697 to be invalid on March 2, 1970. *Technograph Printed Circuits, Ltd.* v. *United States*, 164 U.S.P.Q. 584 (1970). We are advised by counsel for the parties here that this decision is under advisement before the Court of Claims together with a government motion urging estoppel based on the *Bendix* case.

On May 3, 1971, the Supreme Court of the United States decided *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, where the Court concluded that "*Triplett* should be overruled to the extent it forecloses a plea of estoppel by one facing a charge of infringement of a patent that has once been declared invalid." 402 U.S. at 350. The Court added that

[4] The court's order appears as Appendix II, *Technograph Printed Circuits, Ltd.* v. *Packard Bell Electronics Corp.*, 290 F. Supp. 326 (C.D. Cal. 1967).

[5] *Technograph Printed Circuits, Ltd.* v. *United States*, 370 F.2d 571 (Ct. Cl. 1966) and 372 F.2d 969 (Ct. Cl. 1967). In the latter case, the Court of Claims relied upon *Triplett* v. *Lowell*, 297 U.S. 638 (1936) and the possibility of new or additional evidence, 372 F.2d at 978-80.

a plea of estoppel must not be automatically accepted but that a determination should be made "whether a patentee has had a full and fair chance to litigate the validity of his patent in an earlier case . . . ." 402 U.S. at 333. Thereupon, the defendants in four suits (which had been filed in the district court in Maryland, the *Martin-Marietta* case, in addition to the concluded *Bendix* case) moved for dismissal on the ground that *Bendix* constituted collateral estoppel. Judge Watkins, after carefully applying the *Blonder-Tongue* standards for determining whether the plaintiffs had a full and fair trial in *Bendix* and after evaluating plaintiffs' contentions as to why they did not, including virtually all the contentions urged before us in the present case, sustained the pleas of estoppel and dismissed the cases on March 20, 1972. *Technograph Printed Circuits, Ltd.* v. *Martin-Marietta Corp.*, 340 F. Supp. 423 (D. Md. 1972).

On May 31, 1972, Judge Will, who had by that time fully tried the four Chicago consolidated cases* agreed with Judge Watkins that the *Bendix* case presented the plaintiffs with a full and fair opportunity to establish the validity of their patents and that it was "just and equitable to allow the plea of estoppel," thus dismissing the consolidated cases before him. *Technograph Printed Circuits, Ltd.* v. *Methode Electronics, Inc.*, 174 U.S.P.Q. 297 (N.D. Ill. 1972).

Thereafter on February 20, 1973, the Court of Appeals for the Fourth Circuit affirmed Judge Watkins in *Technograph Printed Circuits, Ltd.* v. *Martin-Marietta Corp.*, 474 F.2d 798 (4th Cir. 1973). Judge Widener in a detailed and exhaustive consideration of the application of *Blonder-Tongue* to *Bendix* in view of plaintiffs' multiple contentions against its application, concluded at page 811:

> "Here, the same plaintiffs considered *Bendix* a test case by which they sought to establish the validity of Eisler's patents '165, '960, and '697. They now seek to relitigate the issue of validity as to '697.

*The record brought up to us from Judge Will included 17 volumes of pleadings, 42 volumes of transcript, a great number of depositions, 4 cartons plus 8 folders of exhibits, and a box of "confidential documents."

> They failed to convince the district court in *Bendix* of its validity, and they failed on appeal to convince us that the district court was wrong in the instant cases. Plaintiffs have failed to convince the same district judge who decided *Bendix* that they did not have a full and fair opportunity to litigate in *Bendix*. Again, we agree with the district court. We are of opinion that the plaintiffs had a full and fair opportunity to litigate the validity of '697 in *Bendix* and that it is just and equitable to allow defendants' pleas of estoppel. We believe the instant cases show precisely why the Supreme Court, in *Blonder-Tongue*, overruled *Triplett* and commenced the sustaining of pleas of estoppel by judgment in certain patent cases."

We agree with Judge Widener and the Fourth Circuit, which considered virtually the same contentions made here by the plaintiffs for the non-application of *Blonder-Tongue*. We also agree with Judge Will who had the opportunity to hear all of plaintiffs' evidence and to evaluate it in the light of the *Blonder-Tongue* standards for determining whether *Bendix* was in fact a full and fair trial.

Subsequent to oral argument, plaintiffs urged by letter that we consider our recent decision in *Bourns, Inc.* v. *Allen-Bradley Co.*, Nos. 72-1222 and 72-1223 (June 14, 1973), where in an opinion by Mr. Justice Clark, sitting in the Seventh Circuit by designation, we held that *Blonder-Tongue* does not apply to claims not litigated in the prior case. Plaintiffs have argued that *Bendix* adjudicated the invalidity of method claims 4, 5, 10, 14, 15 and 16 of '697 and that in the present cases claims 11, 12 and 13 are also involved. However, prior to the trial before Judge Will, the parties agreed to finding of fact No. 23 which reads:

> "Claims 11, 12 and 13 are basically the same as claim 10 except for the specific means of printing; they are contingent upon claim 10 and will either stand or fall with claim 10."

Even without the stipulation, a reading of claims 10, 11, 12 and 13 demonstrates the complete dependence of

11, 12 and 13 upon claim 10.[7]

Furthermore, the same contention was made in the Fourth Circuit proceeding where the District Court found plaintiffs had there conceded that, although the *Martin-Marietta* case involved claims 4 and 10-14 and *Bendix* involved 4, 5, 10, 14, 15 and 16, the issues in both cases were "identical". 340 F. Supp. at 425. That fact was not contested on appeal. 474 F.2d at 802.

Under all of these circumstances the invalidity of claims 11, 12 and 13 were established by *Bendix*.

Defendant GTE Automatic Electric Inc. has cross-appealed from the trial court's refusal to award it costs and attorney fees. In this circuit, attorney fees are only awarded under 35 U.S.C. §285 in exceptional cases "to prevent gross injustice and where fraud and wrong-doing are clearly proved." *Sarkes Tarzian Inc.* v. *Philco Corp.*, 351 F.2d 557, 560 (7th Cir. 1965).

Although the defendants rely upon a 1951 statement by Eisler, the inventor of '960, '165 and '697, that "we have fooled the Patent Office" and the 1956 statement by the president of one of the plaintiffs that the patents were "inherently weak," we note in Judge Will's opinion that the defendants "were apparently content to go on litigating indefinitely over the validity of a patent no matter how frequently it had been found invalid." 174 U.S.P.Q. at 299. In addition, until the *Blonder-Tongue* decision, the plaintiffs were justified in relying at least to some extent upon *Triplett* v. *Lowell*. Thus we find that

[7] "10. A method of manufacturing a component of electric and magnetic circuit systems involving an insulation backed conductive pathway pattern, which comprises providing insulation backed foil, then printing a negative representation of the pattern upon said foil, depositing a layer of metal dissimilar to the metal of said foil upon all exposed parts of said foil, then removing said representation from the foil, and finally removing all parts of the foil exposed by said removal of the representation by chemical action attacking the metal of said foil but not said deposited dissimilar metal whereby said pathway pattern is formed.

"11. The method of claim 10 wherein the negative representation of the pattern is produced by letterpress printing.

"12. The method of claim 10 wherein the negative representation of the pattern is produced by offset printing.

"13. The method of claim 10 wherein the negative representation of the pattern is produced by photo-mechanical means."

Judge Will did not abuse his discretion in declining to find this to be the "exceptional" case. We do, however, assess all costs of these appeals against the plaintiffs.

The judgment is affirmed in all respects.

AFFIRMED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

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REPLY BRIEF OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-147

TECHNOGRAPH PRINTED CIRCUITS, LTD. and TECHNOGRAPH PRINTED ELECTRONICS, INC.,

Petitioners,

v.

MARTIN-MARIETTA CORPORATION, WESTINGHOUSE ELECTRIC CORPORATION, McDONNELL AIRCRAFT CORPORATION and INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION,

Respondents.

PETITIONERS' REPLY BRIEF

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Respondents.

PETITIONERS' REPLY BRIEF*

I

Respondents state (p. 7) that for the first time, in this Court, petitioners are asserting "that a different issue is involved than in *Bendix*", but that is not so. The opinions of the District Court and the Court of Appeals for the Fourth Circuit in *Westinghouse* both

* On August 27, 1973, the dismissal of the Chicago class action was affirmed. *Technograph Printed Circuits* v. *Methode Electronics*, —— F2d —— (C.A. 7), opinion appended hereto and cited herein as (A-67 et seq.).

clearly state that the instant complaints are for alleged infringement of "*claims 1 and 10-14* inclusive of '697" (A-2 and A-35, emphasis supplied) and the Fourth Circuit below acknowledged that *Bendix* only adjudged "claims 4, 5, 10, 14, 15, and 16 of '697" (A-36) invalid. Therefore, both courts below recognized on the face of their opinions that *Bendix* did *not adjudicate* the validity of claims 11, 12 and 13. Contra respondents (p. 7), the validity of claims 11, 12 and 13 is not a "new issue" being "raised for the first time in the Supreme Court." Plaintiffs never waived their contention that claims 11, 12 and 13 were valid and that they were not estopped by *Bendix* under *Blonder-Tongue* from establishing the validity of these claims in a second trial.

Respondents' reference to agreed finding of fact No. 23 in the Chicago class action is completely beside the point. In that finding the parties agreed, for purposes of a decision on the *merits of '697* by the U.S. District Court *after trial*, that claims 11, 12 and 13 "are contingent upon claim 10 and will either stand or fall with claim 10." That plainly has nothing to do with collateral estoppel. When the petitioners agreed to that finding, they were advocating, under *Triplett*, for a decision that *Bendix* was erroneous and should not be followed, and that all the enumerated claims were valid. As a matter of law, under *Bourns, Inc.* v. *Allen-Bradley Co.* (C.A. 7, June 14, 1973, A-51), an estoppel against a decision on the merits as to one claim, because previously adjudicated on the merits, is no estoppel against a decision on the merits of another claim which has not been previously adjudicated on the merits.

That *Bendix*, in invalidating claim 10, could not be an adjudication on the merits of claims 11, 12 and 13, not only follows from *Bourns, supra*, but is mandated by the statute itself (35 U.S.C. § 282): "dependent claims shall be presumed valid even though dependent upon an invalid claim". Therefore, as a matter of law, under *Bourns* and § 282, the petitioners are, at least, entitled to a determination on the merits of claims 11, 12 and 13 of '697.

Contra respondents, petitioners' appendix (A-1) clearly indicated that § 282 was cited "As amended, July 24, 1965". Contra respondents, petitioners did *not* claim and are *not* claiming that the 1965 amendment to § 282 is retroactive. On the contrary, plaintiffs' claim is that the 1965 amendment to Section 282 was effective at the time of the decisions by the District Court (March 20, 1972) and the Court of Appeals (February 20, 1973) in *Westinghouse* on the issue of collateral estoppel under *Blonder-Tongue*.

Contra respondents, the conflict between the Seventh Circuit (per *Bourus*) and the Fourth Circuit (per *Westinghouse*), *first* became a new issue on June 14, 1973, the date of the *Bourus* decision, which post-dated the decision of the Fourth Circuit in *Westinghouse* (February 20, 1973). Obviously, petitioners could not have raised that conflict issue prior thereto.

In the August 27, 1973 decision, the Seventh Circuit recognizes that *Bendix* did not adjudicate claims 11, 12, and 13, yet inconsistently therewith and with § 282 and *Bourus*, holds that "the invalidity of claims 11, 12 and 13 were established by *Bendix*" (A-73).

In the August 27, 1973 decision (A-67 et seq.), the Seventh Circuit did not discuss any of the petitioners' other reasons why *Bendix* should not, under *Blonder-Tongue*, foreclose a decision now, on the merits of any of the Eisler '697 claims.

II

Petitioners *quoted* from the decision by the Fourth Circuit (A-42) in their petition (pp. 10-11); the quoted excerpt demonstrated that in fact the Fourth Circuit did erroneously rely upon the holding of *anticipation* in *Bendix* in affirming the district court on the issue of "obviousness". Respondents misrepresent to this Court when they say petitioners' statement is "unsupported"; petitioners' quo-

tation from the Fourth Circuit's Opinion (A-42) is the support for plaintiffs' statement.

Contra respondents (p. 15), the evidence is overwhelming and unrefuted in support of petitioners' position on Whilems and Norris '203 (Petition, pp. 11-15).

Petitioners' position that the courts in *Bendix* wholly failed to grasp the technical subject matter in suit as to '697 stands unrefuted.

III

On the issue of suppression of crucial evidence in *Bendix*, respondents have confused the Rubin *notes* with the Rubin *patent*. Contra respondents (p. 16), petitioners' item of "newly discovered evidence" was not the Rubin *patent*, which was not only in the *Bendix* case but was also a reference cited against Eisler patent '697. It was Rubin's notes and accompanying file that were suppressed in the *Bendix* case.

Rubin's notes, not his patent, demonstrated objectively that Rubin, with all the pieces at hand, failed to conceive the metallic etch resist process for electrical components. We further demonstrated in our petition (pp. 15-17) why such notes were not cumulative and were crucial.

Respondents and the Court of Appeals rely upon Bendix's supplemental answer to interrogatories to put plaintiffs on notice about the Rubin notes but that answer contained a misrepresentation, which threw plaintiffs off. Bendix's pre-trial outline contained the same misrepresentation as its previous answer to the interrogatories. Bendix, which made the misrepresentation, is at fault, not the petitioners, who innocently failed to discover it until many years later.

The overriding fact is that Bendix counsel had the notes in their possession and did not produce them at the trial in *Bendix*.

Objective consideration of the Rubin notes dictates a different result than reached by *Bendix*, on the validity of patent '697.

IV

The respondents (p. 19) rely upon the analysis below "that the single most pertinent reference in *Bendix* was not even before the House of Lords," to wit, the print and etch technique of Stevens and Dallas. The Court of Appeals below, with all due deference, erroneously believed that Stevens and Dallas was concerned with "electrical *circuits*"; (A41) instead it was concerned with "electrical *components*"; that fundamental confusion explains why the Fourth Circuit erroneously gave no weight to the House of Lords decision upholding Eisler's English patent on the use of "print and etch" to manufacture "electrical circuits" (Petition, pp. 12-13 and footnote).

Since Eisler's English print and etch patent is non-obvious, per the House of Lords, *a fortiori* Eisler's more sophisticated "print, plate and metallic etch resist" '697 patent is non-obvious.

CONCLUSION

For the reasons stated in the Petition for Certiorari and this Reply Brief, certiorari should be granted.

Respectfully submitted,

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Respondents

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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SUPPLEMENTAL BRIEF FOR RESPONDENTS

This brief is filed pursuant to Rule 41(5) of the Supreme Court Rules to invite this Court's attention to an opinion in a case related to this one, issued August 27, 1973, subsequent to the filing of respondent's brief herein.

The August 27 opinion is in the Seventh Circuit case involving the same patent here in suit, referred to at pages 5 and 6 of respondents' brief in opposition, namely *Technograph Printed Circuits, Ltd.* v. *Methode, Inc.* (hereinafter *Methode*). A copy of the opinion is

reproduced in a separate appendix filed with petitioners reply brief (Petition A67).

The unanimous Seventh Circuit opinion agrees with the Fourth Circuit opinion herein, in holding plaintiffs collaterally estopped to retry the valdity of the involved patent. Indeed, the Seventh Circuit found it unnecessary to discuss most of the contentions made before them because it agreed with the discussion thereof by the Fourth Circuit hereinbelow. The Seventh Circuit said:

> "We agree with Judge Widener and the Fourth Circuit, which considered virtually the same contentions made here by the plaintiffs for the non-application of *Blonder-Tongue.*" (Petition A 67, 72).

Additionally, the Seventh Circuit panel expressly considered the holding by another panel of the same Circuit in *Bourns, Inc.* v. *Allen-Bradley Co.*, (hereinafter *Bourns*), 178 USPQ 193 (7 Cir. 1973), Petition A 57. The latter decision is asserted by petitioners here to be in conflict with the Fourth Circuit decision hereinbelow (Petition 2, 23-4). Petitioners' position with respect to *Bourns* was found to be without merit by the Seventh Circuit, which said:

> "Subsequent to oral argument, plaintiffs urged by letter that we consider our recent decision in *Bourns, Inc.* v. *Allen-Bradley Co.*, Nos. 72-1222 and 72-1223 (June 14, 1973), where in an opinion by Mr. Justice Clark, sitting in the Seventh Circuit by designation, we held that *Blonder-Tongue* does not apply to claims not litigated in the prior case. Plaintiffs have argued that *Bendix* adjudicated the invalidity of method claims 4, 5, 10, 14, 15 and 16 of '697 and that in the present cases claims 11, 12 and 13 are also involved. However, prior to the trial before Judge Will, the parties agreed to finding of fact No. 23 which reads:

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"Even without the stipulation, a reading of claims 10, 11, 12 and 13 demonstrates the complete dependence of 11, 12 and 13 upon claim 10.

"Furthermore, the same contention was made in the Fourth Circuit proceeding where the District Court found plaintiffs had there conceded that, although the *Martin-Marietta* case involved claims 4, 5, 10, 14, 15 and 16, the issues in both cases were 'identical'. 340 F. Supp. at 425. That fact was not contested on appeal. 474 F.2d at 802.

"Under all of these circumstances the invalidity of claims 11, 12 and 13 were established by *Bendix.*" (Petition A67, 72-3).

Petitioners have requested this Court, by motion dated August 14, 1973, to delay its consideration of the petition herein pending decision by the Seventh Circuit and by the Court of Claims, asserting the possibility of conflict between these courts and the courts below. The decision in the Seventh Circuit has now been handed down and is fully in accord with the decisions below. It is not known when the Court of Claims may act on this case. Respondents feel it unnecessary otherwise to comment on petitioners' request.

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